

REMARKS

Reexamination and Reconsideration of the rejections and objections is requested. Upon entry of the Amendment Claims 1-111 are pending in the application.

The §112 Rejection

The Examiner has rejected Claims 93-100 under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention. The Examiner refers to "the phrase 'preferably' at lines 14 and 15" of Claim 93. This phrase does not appear at the indicated lines. The Applicants, in response to the Examiner's comments, have deleted phrases at lines 16-18 and 29-31. Claim 93, as amended, is believed to obviate the Examiner's rejection. The "preferably" phrase has been deleted to indicate that the material is not part of the claims. Also, "vinyl ester" in line 15 was deleted to correct a typographical error. The rejection is requested to be withdrawn.

The §102 Rejection

The Examiner has rejected Claims 77-83 under 35 U.S.C. §102(e) as being anticipated by Wilhoit, et al., U.S. Patent No. 5,928,740.

Claims 77-83 all claim a polymer blend.

Applicants traverse this rejection for the following reasons.

There is no identity of invention between the disclosure of Wilhoit and the instant claims. The present invention requires selection of amounts and polymers in a film of specified properties. The limitations of the present claims have not been shown by the Examiner to have been taught by Wilhoit. These limitations reflect both the choice of many composition parameters and processing parameters. The burden is on the Examiner to make a *prima facie* case of anticipation to maintain a §102 rejection and that burden has not been met. "Inherency, however, may not be established by probabilities or possibilities." See, *Ex parte Skinner*, 2 USPQ2d 1788, at 1789 (U.S.P.T.O. BOAI, 1987).

The amounts referred to by the Examiner fall not only within the amounts claimed by the present invention, but also outside the claimed range. The present invention does not need the required second polymer of Wilhoit '740, and there is selection involved, not only in comonomer type (a selection of octene -1 from over a half dozen different monomers), but also in the required melting point for the required first polymer among others. None of the examples offered by Wilhoit '740 read on the presently claimed invention and there is no description of the specifically claimed invention.

The Examiner also states that the terpolymers of Wilhoit encompass interpolymers, but a terpolymer is not necessarily an interpolymer and Wilhoit '740 does not mention or suggest use of interpolymers.

The present invention defines "interpolymer" thusly,

"...An interpolymer means a polymer product comprising at least two polymers *e.g.* copolymers of ethylene which are polymerized in either a single reactor or separate multiple reactors operated in parallel or series, *e.g.* as described in Parikh, et al. PCT Application No. US92/11269 (Publication No. WO93/13142) entitled "Ethylene Interpolymer Polymerizations" filed December 29, 1992 claiming a U.S. priority Serial No. 07/815,716, filed December 30, 1991, which application and disclosure is hereby incorporated by reference in its entirety." (See, Page 70, antepenultimate line to Page 71, line 12).

Therefore, it is clear that the description of terpolymers in Wilhoit '740 does not suggest use of the interpolymers as presently claimed.

The Examiner's reference to Claims 71-84 in the first line of Paragraph 5 of Paper No. 11 is understood to be a typographical error since the Examiner's argument does not relate to the specific subject matter of Claims 71-76 and 84 and the above reply is based upon the concluding referral to Claims 77-83. If the Examiner intended otherwise, then an explanation of the pertinence of the §102(e) rejection to these other claims is requested.

Insofar as the rejection might be applied to Claims 71-76, Applicants further note the lack of a rejection of independent Claim 70 on this ground and submit that these dependent claims are novel for at least the same reasons that the independent claim is novel and note especially the limitations relating to film properties specified therein. Insofar as the rejection might be applied

to Claim 84, this claim is novel and patentable for the same reasons communicated above with regard to Claims 77-83.

The §103 Rejection

The Examiner has rejected Claims 86, 87, 89 and 92 under 35 U.S.C. §103(a) as being unpatentable over Wilhoit, et al.

These claims are all process claims. The above argument made with respect to the §102(e) rejection is reiterated.

It is further noted that Claim 89 requires that the first polymer comprise at least 50% of this component blend. This is in contrast to the teachings of Wilhoit '740, where it is stated that when the four component blend is used (which must be used under the analysis of the Examiner), the following is stated.

When a preferred four component blend is used the first polymer will be present in an amount of from about 20 to 30% based upon the weight of the layer comprising the blend. (Col. 7, lines 55-58).

This teaches away from the claimed invention of Claim 89, which requires all the noted selections plus the limitation that the first polymer comprises at least 50% of the blend.

It is well established that the Patent Office has the initial duty of supplying the factual basis for its rejection. See, *In re Warner & Warner*, 154 USPQ. 173 (CCPA, 1967).

With respect to Claims 86, 87, 89 and 92, nothing in the Wilhoit, et al. reference provides the motivation or suggestion for selecting the particular amounts and polymers to arrive at the invention claimed.

The present process invention, as broadly defined in Claim 86, not only achieves superior performance with respect to several combinations of film properties, but does so while omitting a required component of the Wilhoit, et al. reference, viz, either Wilhoit's first polymer having a melting point between 55 to 75°C comprising a copolymer of ethylene and at least one α -olefin or Wilhoit's second polymer having a melting point between 85 to 110°C comprising ethylene and at least one α -olefin. The present claims also specify narrow ranges of the amounts of the polymers. It is noted that the present process invention, as claimed, requires use of a specific

copolymer, viz, ethylene and octene-1 having a melting point between a specific range. This range overlaps, but varies, from the ranges specified in Wilhoit '740 for Wilhoit's first and second polymers.

Also, all three polymers exemplified by Wilhoit, et al. for use as their second polymer (See Col. 8, lines 1-3) fall outside the definition of the first polymer of instant Claim 1. Both Affinity PL 1840 and PL 1880 are ethylene octene copolymers which have melting points outside the claimed ranges and Exact 3032 is an ethylene hexene-1 copolymer which is also outside the claimed melting point range.

Also, neither polymers exemplified by Wilhoit, et al. for use as their first polymer (See Col. 7, lines 31-33) are copolymers of ethylene and octene-1 as required by the present invention. Also, assuming that the Examiner is positing the third polymer of Wilhoit, et al. as providing the basis for the second polymer as presently claimed, it is noted that Wilhoit, et al. provides an expansive list for their third polymer which may be LDPE, HDPE or a propylene copolymer as well as an ethylene α -olefin copolymer. It is also noted that the melting point range is similar, but not identical. Also, the present invention requires specific amounts of a specified third polymer.

The teachings of the selection of specific polymers having specific properties in defined ranges is not found in the Wilhoit, et al. reference. The presently claimed process advantageously produces a film having a combination of properties not taught and not inherent in the films taught by Wilhoit, et al. The rejection should be withdrawn.

The Double Patenting Rejection

Claims 1-111 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over Claims 1-108 of copending Application No. 09/401,692, in view of Wilhoit, et al., U.S. Patent No. 5,928,740.

Reconsideration of this rejection is respectfully requested. The "first polymer" of copending Application No. 09/401,692 is required to be a copolymer of ethylene and hexene -1, whereas, the present invention requires the first polymer to be a copolymer of ethylene and octene -1. Hence, there is no species-genus overlap between these two cases.

It is further submitted that both Application Nos., 09/431,931 and 09/401,692, claimed the benefit of U.S. Application No. 09/110,455, filed July 7, 1998, as the earliest filing date for both applications and as such under 35 U.S.C. §154(a)(2), both applications, if granted, will have identical terms based upon that same starting point. Accordingly, there is no possibility of any "unjustified or improper timewise extension of the 'right to exclude' granted by a patent..." Thus, the public policy underpinning the judicially created obviousness-type double patenting doctrine is inapposite. The terms of any patents granted would be based on the same starting date and therefore, Applicants should not be put to the burden and expense of filing a terminal disclaimer which is meaningless with respect thereto.

The lack of a public policy reason for this rejection notwithstanding, it is improper and should be withdrawn primarily for the reason that the claims are different, patentably distinct, requiring different first polymers and neither polymer is a subset of the other.

In view of the above amendment and remarks, reexamination and reconsideration of all the rejections are requested, and allowance of all the claims is earnestly solicited.

If, after consideration of the above remarks, the Examiner has any remaining questions or concerns, please feel free to telephone the undersigned to discuss those concerns or questions.

Respectfully submitted,



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Version With Markings To Show Changes Made:

93. (Twice Amended) A biaxially stretched, heat shrinkable, multilayer film useful for food processing and packaging having at least four layers comprising:

a first heat sealing surface layer comprising a polymer or blend of polymers selected from the group consisting of: (a) at least 50% by weight of a copolymer of propene and at least one α -olefin selected from the group consisting of ethylene, butene-1, methylpentene-1, hexene-1, octene-1 and mixtures thereof having a propene content of at least 60 wt. %, and (b) at least 50% by weight of a copolymer of ethylene and at least one α -olefin selected from the group consisting of propylene, butene-1, methylpentene-1, hexene-1, octene-1 and mixtures thereof having a melting point of at least 105°C and a density of at least 0.900 g/cm³;

a second polymeric layer comprising a blend of (a) from 25 to 85 wt. % of a first polymer having a melting point of 55 to 95°C comprising a copolymer of ethylene and octene-1; (b) from 5 to 35 wt. % of a second polymer having a melting point of 115°C to 128°C comprising a copolymer of ethylene and at least one C₄-C₈ α -olefin; and (c) from 10 to 50 wt. % of a third polymer having a [vinyl ester] melting point of 60 to 110°C comprising a copolymer of ethylene with a vinyl ester, [preferably 4 to 18% by weight of said copolymer,] acrylic acid, methacrylic acid, or alkyl acrylate, [preferably 4 to 30% alkyl acrylate by weight of said copolymer,] wherein said first and second copolymers have a combined weight percentage of at least 50 weight percent, said weight percent being based upon the total weight of said first, second and third polymers;

a third layer comprising at least 80% by weight, based on said third layer's weight, of EVOH or at least one copolymer of vinylidene chloride with from 2 to 20 weight percent, based on said copolymer's weight, of vinyl chloride or methyl acrylate; and

a fourth polymeric layer comprising (a) from 10 to 85 wt. % of a first copolymer of ethylene and at least one C₃-C₈ α -olefin, said first copolymer having a melting point of 55 to 98°C, (b) from 5 to 60 wt. % of a second copolymer of ethylene and at least one C₄-C₈ α -olefin, said second copolymer having a melting point of 115°C to 128°C, and (c) from 0 to 50 wt. % of a third copolymer having a melting point of 60 to 110°C of ethylene with a vinyl ester, [preferably 4 to 18 wt. % of vinyl ester based on the weight of said third copolymer,] acrylic acid, [preferably 4 to 30 wt. % of acrylic acid based on the weight of said third copolymer,] methacrylic acid, or alkyl acrylate, wherein said first and second copolymers have a combined weight percentage of at least 50 weight percent, said weight percent being based upon the total weight of said layer; and

wherein said film has a shrinkage value at 90°C of at least 40% in at least one of the machine and transverse directions, and said film has a tensile seal strength of at least 400 g/cm at 88°C.